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NO. 57214-8-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

KATHIE COSTANICH,

Respondent,

v.

DEPARTMENT OF SOCIAL & HEALTH SERVICES
FOR THE STATE OF WASHINGTON,

Appellant.

REPLY BRIEF OF APPELLANT DEPARTMENT

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I. SUMMARY OF ARGUMENT

The Respondent makes several fundamental errors in her section devoted to the standard of review that applies to judicial review of final administrative decisions pursuant to the Washington Administrative Procedure Act (WAPA). RCW Chapter 34.05. First, Respondent incorrectly asserts that the Appellate Court reviews the Superior Court decision in an administrative hearing case. Second, the Respondent makes wholly inaccurate assertions regarding the deference due to an Administrative Law Judge ("ALJ") and the limited role a reviewing officer (in this matter the Review Judge) plays in the administrative decision-making process. Her assertions stand the decision-making process designed by the Legislature on its head. Finally, the Respondent incorrectly maintains that a decision may not be based on hearsay, when the WAPA explicitly permits the introduction and admissibility of hearsay in administrative decisions.

A. This Court Reviews the Final Administrative Decision of the Agency Pursuant to the Washington Administrative Procedure Act.

1. The Appellate Court Applies the Standards of the Washington Administrative Procedure Act Directly to the Record Before the Agency.

The Respondent states that the Appellate Court is limited in its review as to whether or not the Superior Court erred in reversing the final administrative decision of the agency. Resp.'s Brief at 16-18. She maintains that the Appellate Court conducts a direct review of the record

only when the agency decision has been affirmed by the Superior Court. Id. at 17. However, none of the cases that address the issue of the Appellate Court's review of the administrative record hold that the review of the record takes place only when the Court is reviewing a case where the Superior Court is affirming a decision of the agency. See e.g. Bond v. Dept. of Social & Health Svcs., 111 Wn. App. 566, 571, 45 P.3d 1087 (2002), Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

While the Superior Court is required by statute to issue a detailed ruling regarding why it is reversing an agency decision[1] the "general rule is that a superior court's findings are not relevant in appellate review of an agency action." Trades Council v. Training Council, 129 Wn.2d 787, 799, 920 P.2d 581 (1996). Moreover, there are several cases which are identical procedurally to what took place in this case – an Administrative Law Judge decision in favor of the licensee, a Review Judge decision in favor of the Department, and a Superior Court reversal of the review decision – and, in each of those cases, the Appellate Court held that it sits in the same position as the Superior Court and applies the standards of the WAPA directly to the record before the agency. See Conway v. DSHS, 131 Wash. App. 406, 414 (2006), Aponte v. DSHS 92 Wn. App. 604, 615, 965 P.2d 626 (1998). Therefore, it is the review decision that this Court reviews and not the Superior Court decision.

[1] See RCW 34.05.574(1).

2. The Court Reviews the Review Judge's Decision and Final Order, Not the Administrative Law Judge's Initial Decision.

The Respondent also incorrectly requests that this Court give deference to the decision of the ALJ. The Respondent devotes much of its brief to arguments about the validity of the ALJ's decision and actions. Resp.'s Brief at 19-24. The Respondent correctly points out that the ALJ is able to observe the demeanor of witnesses but incorrectly asserts that the ALJ is the final fact-finder in the administrative process. Id. In reaching her conclusion the Respondent ignores the WAPA and case law.

In cases involving the revocation of a foster care license and findings of abuse and/or neglect the ALJ is authorized by statute and regulation to render an initial decision. RCW 34.05.461(1)(c), WAC 388-02-215(4) (l) and (m). Review Judges have the authority to enter final orders in the cases described in WAC 388-02-215(4). RCW 34.05.464(2), WAC 388-02-0600.

The Respondent states that the facts must be viewed in the light most favorable to the Respondent. Resp.'s Brief at 20. However, her citations do not support this assertion. She quotes Ongom v. Dep't. of Health, 124 Wn. App. 935, 104 P.3d 29 (2005) as holding that the reviewing court should view the evidence and reasonable inferences in the "light most favorable to the party that prevailed at the highest forum that exercised fact-finding authority..." Id. at 949, but she fails to recognize that this deference is provided to the Review Judge *not* the ALJ.

The seminal case in this area is Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 858 P.2d 494 (1993). In Tapper the appellant argued that the final administrative decision-maker, the Commissioner, was bound by the factual findings of the ALJ. In Tapper the Supreme Court quoted the applicable statute:

> The WAPA describes the procedure by which subject agencies are to conduct internal review of the adjudicative decisions of lower officials. RCW 34.05.464(4) states, in part:
>
> (4) The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. *The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing,* . . In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses. Id. at 402. (emphasis in original).

The statute is identical today and applies to this case. The Tapper court held that the Commissioner was the reviewing officer for purposes of the statute and therefore had the power to "exercise *all* the decision-making power" of the official who presided over the initial hearing. Id. (emphasis added). Since the ALJ had the power to make findings of fact then the "Commissioner has the power to make his or her own findings of fact and in the process set aside or modify the findings of the ALJ." Id. In this case the Review Judge is the reviewing officer and is authorized to make his or her own decision as if he or she were presiding over the hearing.

The role of the Review Judge in the administrative process is not intuitive: generally an "appellate" tribunal defers to the fact-finder. See Tapper, 122 Wn.2d. at 405, Anderson, "The 1988 Washington Administrative Procedure Act – an Introduction," 64 Wash. L. Rev. 781, 816. However, this is not true in most administrative cases. The federal government and most state statutes provide broad power to the final agency decision-maker. Id. However, as Professor Anderson points out, the broad power delegated to the review judge is not unfettered. The review judge must give "due regard" to the ALJ's opportunity to observe the witnesses, RCW 34.05.464(4), *and* the final decision of the agency is subject to judicial review and must be supported by substantial evidence. Id.

The Respondent complains that the Review Judge re-weighed the evidence, including both the live testimony presented and the hearsay admitted at the adjudicative hearing. She is correct. This role is precisely the legislatively prescribed function of the Review Judge.

The Respondent states that the Review Judge was biased and states that he accepted "100%" of the allegations put forth by the agency. Resp.'s Brief at 27. This is not true. In fact, the Review Judge rejected many of the allegations of the Department as unproven. There were numerous allegations of physical abuse (that Respondent choked Frank, that Frank turned blue, that Patrick had urine-soaked sheets rubbed in his face, and was slapped and choked, that Elizabeth had her hair pulled and

was kicked in the back) that were rejected by the Review Judge because of inconsistent statements by witnesses or because stories changed over time. AR[2] at 11, 31, 35-6, 43-8. The Review Judge did make adequate findings, with careful citations to the record, in support of his findings that Respondent swore at the children and subjected them to verbal and emotional abuse.

Respondent's frequent citations to case law requiring deference to the fact-finder in the administrative decision-making process are correct. Resp.'s Brief at 20-3. The substantial evidence standard is "highly deferential" to the agency fact-finder. ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The court will view the evidence in the light most favorable to the party who prevailed in the highest administrative forum to exercise fact-finding authority. City of Univ. Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). The court will accept the fact-finder's determinations of witness credibility and the weight to be given to reasonable but competing inferences. Id. However, the Respondent is under the mistaken belief that the relevant fact-finder is the ALJ. In fact, as explained above, the deference must be shown to the Review Judge who is the final fact-finder pursuant to the relevant statute and case law. RCW 34.05.464(4), Tapper, 122 Wn.2d 397, 402.

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[2] As in the Department's Opening Brief the transcripts from the hearing below are referred to by their volume number and page number; e.g. RP v. _ at _. The exhibits are part of the certified agency record provided to the court and they are consecutively numbered. References to the exhibits and other documents will be "AR at __."

B. The Review Judge Properly Relied on Hearsay and His Decision is Supported by Substantial Evidence.

1. Hearsay is Admissible in an Administrative Hearing and May be Relied Upon by the Review Judge in Making His or Her Decision.

The Respondent maintains that hearsay is not permissible in an administrative hearing. Hearsay testimony is admissible under the WAPA. The WAPA provides that:

> (4) Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceedings and on matter officially noticed in the proceedings. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. *Findings may be based on such evidence even if it would be inadmissible in a civil trial.* However, the presiding officer shall not base a finding *exclusively* on such inadmissible evidence unless the presiding officer determines that doing so would *not unduly abridge the parties' opportunities to confront witnesses and rebut evidence.* The basis for this determination shall appear in the order. RCW 34.05.461(4) (emphasis added).

Thus, hearsay evidence may be relied upon when it is the type of evidence that a reasonably prudent person would rely upon and it does not unduly abridge the right of the party to confront and rebut evidence. The fact that the ALJ chose to reject the hearsay evidence is not dispositive of the issue because the Review Judge retains all the decision-making powers of the ALJ. RCW 34.05.464(4), See discussion supra at 3-5. The WAPA requires the reviewing officer to give "due regard" to the ALJ's opportunity to observe the witnesses. RCW 34.05.464(4). But, in this case, as pointed out by the Review Judge, the ALJ only recorded his observations about one of the many witnesses who testified. AR at 14. In

discussing the hearsay testimony of the children the Review Judge carefully considered a number of factors including evidence regarding their memory, their character, their motive to lie and whether there was corroboration of their statements. AR at 26-9.

Respondent's Brief assumes that all of the findings of fact that were made by the Review Judge were impermissible because they relied upon hearsay. The statute is carefully crafted to state that when a conclusion rests "exclusively" on hearsay the fact-finder must ensure that the right to confront witnesses and provide rebuttal evidence is not "unduly" abridged. RCW 34.05.461(4). The Review Judge explicitly acknowledged this standard in his decision. AR at 12-3.

Many of the Review Judge's findings were not exclusively based on hearsay. For example, the Respondent referring to Patrick's "black ass" was based on the admission of the Respondent and on testimony from the hearing. See Dept.'s Brief at 9, 21-2, AR at 8, 37. The finding that the Respondent swore at the children was based on a combination of live testimony and hearsay from numerous adults and children. Dept.'s Brief at 13-14, 20-2, AR at 10-11, 49-53. Similarly, the conclusion that the Respondent called Elizabeth a "bitch" was based on the hearsay statements of four children and the testimony of two adults. Dept.'s Brief at 10-1, AR at 9, 38-9.

In the two instances where the Review Judge did exclusively rely on hearsay he explained at length why he did so and why the

Respondent's opportunity to confront witnesses and present rebuttal evidence was not unduly abridged. The Review Judge found that Respondent had stated to Frank, "Stop fucking lying, tell the truth, I'll kill you bastard." Department's Brief at 9-10, 21, AR at 4, 32-4. This was based on the consistent statements of Kevin and Frank, as opposed to the inconsistent statements of the adults. Id. The Respondent stipulated to the admission of Kevin's declaration and declined to call him as a witness. RP v. 1 at 12, v. 9 at 57. She cannot now claim that she was deprived of that opportunity to cross examine him. Similarly, the finding that Elizabeth was called a "cunt" by the Respondent was based on the hearsay testimony of Kevin, Elizabeth and Frank who all made remarkably consistent statements. AR at 40-2. In this case, the Respondent stipulated to Kevin's declaration and she was also able to call Elizabeth as a witness if she wished. AR at 42-3.

2. The Department Properly Revoked the Respondent's Foster Care License and Found She Emotionally Abused the Children Based on her Verbal Abuse of the Foster Children.

a. Respondent's verbal abuse violated foster care regulations.

There is substantial evidence that Respondent directed profane language at her foster children on a regular basis, threatened to kill a child in her care, called a child a "bitch" and "cunt" and told Patrick to move his "black ass." Dept.'s Brief at 19-22. The Washington State Legislature has made it abundantly clear that the well-being and safety of foster children is

the top priority of the foster care system and that foster homes must be held to a high standard of care. Id. at 22-23. The Respondent violated the regulations that were promulgated to provide this high standard of care to children.

Respondent's actions violated regulations that prohibit humiliating discipline and require foster homes to provide a nurturing and supportive environment. The fact that she swore at the children is prohibited by regulation whether on not there is actual harm to the child or an intent to harm the child. Id. at 24-27. It is also clear that her swearing at the children, no matter how innocuous her intent, was inappropriate, demeaning, and violated the regulations requiring a foster care parent to provide a nurturing environment and care for the emotional needs of the children in their care. Id. The Department properly applied the law to the facts of this case and revoked her foster care license.

b. Respondent's verbal abuse of the children constituted emotional abuse.

As described in the Department's opening brief there was substantial evidence that the Respondent engaged in threatening a child, and swearing at all of the children on a regular basis. These were children who were abused and neglected in their own homes and had a variety of medical and emotional needs including depression, self-esteem problems, anger, sexual aggressiveness, and learning disabilities. Dept.'s Brief at 3-6. The constant verbal abuse by respondent constitutes emotional abuse.

Respondent maintains that there was no showing of actual harm to the children, therefore it is impossible to say that the children were emotionally abused. The Review Judge made a finding that there was evidence indicating that some of the children were doing better in the care of the Respondent and some did better when they left her care. AR at 58-60.[3] But the Review Judge stated that this was an inadequate measure of harm because of the complexity of children's behaviors and various reactions to emotional abuse. It is also obvious that with children who have multiple psychological, social and medical problems such as these children had (see Dept.'s Brief at 3-6), it would be difficult, if not impossible, to separate out the reasons for their behaviors, many of which pre-existed their living with the Respondent.

However, given the facts of this particular case, the Review Judge found that there was emotional abuse. The threat to kill, telling Patrick to move his "black ass," calling Elizabeth a "bitch" and "cunt," and swearing at the children using the following phrases: "Clean your fucking room you little bitch," "Fuck you, go to your fucking room," "Clean your fucking room you cunt," "Clean your dirty room you stupid bitch," "Fucking bitch" and "Fuck you, shut your fucking mouth," constituted cruel and

[3] The Review Judge discussed the testimony of the expert witnesses and their point that children vary in their resiliency to any type of abuse. As a result, actions, verbal or otherwise, would have different effects on children depending on their resiliency and other factors in their lives. AR at 18-9. Dr. Lund did point out that given the multiple needs and problems of the children, they needed consistency and stability in their home environment along with firm but respectful discipline and proper modeling of coping skills, problem solving and anger management. He emphasized that this needed to be done in a climate of respect. RP v. 8 at 77-9.

abusive statements that created a substantial risk to the mental health and development of the children. AR at 64-9.

These verbal assaults, whether or not they were intended to harm the children, are the types of verbal threats and derogatory remarks that constitute a danger to any child's psychological well-being – whether they are healthy and well-cared for or abused and neglected. These verbal assaults are unacceptable in a civilized society, and constitute emotional abuse pursuant to statute and regulation. Dept.'s Brief at 29-33. The only consequence of this finding, which is appropriate and required by regulation, is that the Respondent not be allowed to care for vulnerable children or adults. Dept's Brief at 30, fn. 23.

The Respondent was in a position of trust – she cared for some of the most abused children in the foster care system. She was well paid, she received support services and, when she felt that the responsibility was overwhelming, she could always refuse to take more children, or take children who had fewer problems. Despite her years in the foster care system Respondent ultimately engaged in acts which were emotionally abusive, painful and demeaning to the young children in her care. These children, who bore the brunt of her verbal abuse, were alone, separated from their families and dependent upon her. When they were in the home and subject to her abusive language they had no one to turn to stop the abuse; they simply had to listen and as Frank said, "get used to it." AR at 3423. Patrick and John reacted by being angry, frustrated and

crying. RP v.2 at 103-4, v. 3 at 49-50. This verbal abuse, at the least, affects a child's self-esteem and self-worth, it models inappropriate and destructive social interactions, and, because it is inherently hostile and disrespectful is a verbal assault on a child's psychological development and a threat to their healthy development. It is emotional abuse which does not leave marks on a child's body but damages a young child's psyche.

II. CONCLUSION

For the foregoing reasons the Department respectfully requests that the Court affirm the final administrative decision of the Department.

RESPECTFULLY SUBMITTED this 16th day of May, 2006.

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STATE OF WASHINGTON, DSHS,

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DECLARATION OF SERVICE

I, Rachel Taylor, declare as follows:

I am a Legal Assistant employed by the Washington State Attorney General's Office. On May 10, 2006 I sent a copy of

1) **Reply Brief of Appellant Department** to the following:

Carol Farr Leonard W. Moen & Associates Suite 100 1107 SW Grady Way Renton, Washington 98055-1217	[**X**]via US Mail, postage pre-paid [ ] via ABC Legal Messenger [ ] via Facsimile

ORIGINAL

I declare under penalty of perjury, under the law of the State of Washington that the foregoing is true and correct.

DATED this 10th day of May, 2006.

RACHEL TAYLOR
Legal Assistant II